SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970.
No. 627

THRIFTIMART, INC., a corporation doing business as SMART & FINAL IRIS CO., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply to Memorandum for the United States in Opposition to Petition.

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The Solicitor General has filed very brief memoranda in opposition to the petition of Thriftimart, Inc. *et al.*, No. 627, and the petition of Alfred M. Lewis, Inc., No. 511. The memoranda of the Solicitor General in fact show that there is a serious conflict among the Courts of Appeals and even in the thinking of the Solicitor General, such that a decision and opinion of this Court is necessary to this area of law.

In the memorandum filed by the Solicitor General in 511 appears this statement, "There is no conflict

with *United States v. J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8) and *United States v. Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found, on the basis of the particular facts before them, that the consent given was not voluntary but a submission to authority. *Cf. Bumper v. North Carolina*, 391 U.S. 543."

In his memorandum in 627 the Solicitor General says essentially the same thing. Thus he states, "There is no conflict with *United States v. J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8), and *United States v. Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found in different circumstances (see Pet. App. A, 14 n. 7), that the consent given was not voluntary, but a submission to authority. *Cf. Bumper v. North Carolina*, 391 U.S. 543."

The significance lies in this:

1. In Thriftimart (627) the Court of Appeals expressly rejects the doctrine of *Bumper v. North Carolina*, 88 S. Ct. 1788, 391 U.S. 543 (1968), *Cipres v. United States*, 343 F. 2d 95 (CCA 9, 1965), and *Schoepflin and Smith v. United States*, 391 F. 2d 398 (CCA 9, 1968) in order to determine that there was consent to the unwarranted intrusion. In short, the Court in Thriftimart says that the measure of determining consent is different because this was "white collar" crime, not "blue collar". Hence, there was no need to show that the waiver of the constitutional privilege reflected an (1) understanding, (2) uncoerced, and (3) unequivocal election to grant inspectors a license to inspect which (4) the party acquiescing knew might be freely and effectively withheld. But in *J. B. Kramer Grocery Co., supra*, the trial court and the Court of

Appeals expressly *followed Bumper v. North Carolina* and hence came to the necessary conclusion that there was *no* consent to the unwarranted intrusion.

2. In both the memorandum filed in Thriftimart, No. 627, and Alfred M. Lewis, Inc., No. 511, the Solicitor General relies on the idea that there was a finding of fact in *J. B. Kramer Grocery Co. v. United States, supra,* determining as a fact that there was no consent and therefore that the evidence must be suppressed. But in Alfred M. Lewis, No. 511, the trial court expressly found on the facts before it that there was no waiver and no consent and therefore that there was a breach of the constitutional rights of defendants which required the suppression of the evidence. We think the Government cannot blow hot and cold on these matters.

3. The memoranda of the Solicitor General conveniently ignores the fact that there are important questions presented by the petitions for certiorari concerning the interpretation and constitutional validity of 21 U.S.C. §§ 374(a), 336; 342(a)(3) and (4), and 331(f) and (k).

4. The Solicitor General also ignores the fact that both the position of the Government in the courts below in this case and No. 511 is an intentional discrimination in criminal prosecution against those engaged in business and designated "white collar" workers as against those who might be classified as "blue collar" workers accused of crime.

The Solicitor General suggests in footnote 2, page 2, of his memorandum in 627 that, "It is not clear whether the principle of *See* and *Camara*—that absent

consent a warrant is required—is applicable to Food and Drug inspections. Compare *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *cf.* Brief for the United States in *Colonnade*, p. 27, n. 23; memorandum in opposition in *Alfred M. Lewis, Inc., supra*."

If this is not clear, then it should be made clear. This suggestion by the Solicitor General in reality comes to this. A statute such as 21 U.S.C. 374(a) is invalid at the hands of the United States Government but void at the hands of the State and local governments. Such discrimination in the constitutional obligations of federal, state and local governments is intolerable. There is no question but that if this suggestion is generally known in administrative circles in the Government of the United States, it will soon be tested to see whether or not this Court will permit Federal administrative agencies to engage in warrantless searches and seizures even though it forbids state and local governments to do the same thing.

It would seem that this Court should grant the petitions for certiorari in both 511 and 627.

Respectfully submitted,

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